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IN THE

Supreme Court of the United States

October Term, 1959.
No. 386

CORA GALENTI GIROUX SMITH,

Petitioner,

vs.

STATE OF CALIFORNIA.

Petition for Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department.

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Petition for Writ of Certiorari to the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department.

Petitioner Cora Galenti Giroux Smith prays that a writ of certiorari issue to review a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department, whereby an appeal taken from a decision of the Municipal Court, Los Angeles Judicial District, was by said Appellate Department of the Superior Court affirmed.

Opinion Below.

The Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department, rendered its Memorandum Opinion, a copy of which is attached in the Appendix hereto. This Memorandum Opinion is not yet reported.

Jurisdiction.

1. The judgment of the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department, was dated June 5, 1959.

2. No extension of time within which to petition for certiorari has been requested.

3. The statutory provisions believed to confer upon this Court jurisdiction to review the judgment by writ of certiorari are 28 U. S. C., 2101(d), and Rule 22(1) of this Court.

Question Presented for Review.

1. The defendant was charged with and convicted of, in substance, committing acts which constituted practicing medicine without a license, when in truth and in fact she was conducting what was facial rejuvenation and amounted to practicing the profession of cosmetology as defined by the courts of California. She was denied equal protection of the law in violation of due process in violation of the Fourteenth Amendment to the Constitution of the United States.

Facts Material to a Consideration of the Question Presented Herein.

A witness, the wife of a physician and surgeon had met the defendant-petitioner and went to her establishment "to have the rejuvenation, facial rejuvenation." [R. T. p. 9.] The petitioner applied a liquid to her face, and subsequently her face was covered with bandages and she was kept at a house maintained by the defendant-

petitioner under the care of an attendant for some days. She asserted that she suffered pain and considerable throbbing. Her husband, as stated, a physician and surgeon, from time to time came to see her and gave her medicine for pain and nervousness. Subsequently a yellow powder was applied to her face for some days until there appeared thereon a crusted mass. [R. T. pp. 9-21.] While at the petitioner's home, photographs were taken of her by a representative of Time Magazine, both before and after the applications. While there a group of persons looked at her, including an examiner from the California State Medical Board. She complained of illness and was removed from the premises by her husband and spent some time in a hospital.

Another witness, a woman who resided in Long Beach, said she had read an article in Confidential Magazine; subsequently she met the petitioner, went to her establishment, where she was taken to a treatment room; she saw the defendant-petitioner there and an attendant [R. T. pp. 129-134.] In a room there appeared to be what looked like a dental chair. That Mrs. Smith, after examining her, said she would remove all the blemishes and that there were some wrinkles on her neck and forehead. [R. T. pp. 135-136.] Some liquid was applied to her face by the petitioner; the liquid burned; later on her face was taped; she remained at the establishment for some days; her face was swollen [R. T. pp. 138-140.] Pictures of the woman prior to the time that she went to the petitioner's place of business were shown to her and received in evidence She was there for some days; suf-

fered some pain, and she went home. [R. T. pp. 150-151.]

Another woman testified she lived in Pittsburgh; she saw an article in Confidential Magazine; she contacted the petitioner. The article referred to an item entitled, "New Faces for Old Without Surgery." She went to the petitioner's residence and met her. [R. T. pp. 70-71.] She stated that the petitioner said she could improve her face and remove a scar. [R. T. p. 73.] Prior to petitioner's taking any action, she had the lady examined by a doctor, an M.D., to ascertain that she was in good health. Thereafter the petitioner put something on her face, which burned. The petitioner said, "Well, you have a very sensitive skin." [R. T. p. 76.] Petitioner applied the solution to her face; a bandage was applied thereafter; then for some time thereafter powder was applied to her face. Before and after her visit to Mrs. Smith, photographs were taken of her. She stated that she was interested in having the wrinkles removed from her face [R. T. p. 87.]

A doctor who had been employed from time to time by the petitioner to examine patients prior to the rejuvenation by Mrs. Smith, testified with reference to a formula concerning which he was asked about, and he said it appeared to contain salicylic acid which is used to dissolve calluses on the soles of the feet; that it would burn the skin. That he saw some of the persons referred to as witnesses herein who had been to Mrs. Smith, the petitioner, and one of the person's neck was red and appeared to be burned by something. [R. T. pp. 196-197.]

The petitioner denied ever having stated she would remove a scar, but stated that she was engaged in the business of giving facial rejuvenations; that she applied liquid to the faces of the witnesses hereinbefore described; that none of them complained of pain; that they never complained of any serious discomfort; that she never at any time said she would remove scars; that after applying the liquid she would apply a tape mask. [R. T. pp. 269-276.] That the ladies would ask if they "would look younger" and that she replied that if they "wanted to look younger and get rid of the wrinkles around their eyes and forehead that she could do that"; that she could remove wrinkles. [R. T. pp. 276-278.]

There was other testimony, but we do not deem it pertinent to a settlement of the question here.

Preliminary Statement.

To the charge in the complaint the defendant entered a plea of not guilty, and was tried and convicted, and after appeal to the Superior Court of the State of California, in and for the County of Los Angeles, Appellate Department, the conviction was affirmed.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

I.

The Defendant Was Charged With and Convicted of, in Substance, Committing Acts Which Constituted Practicing Medicine Without a License, When in Truth and in Fact She Was Conducting What Was Facial Rejuvenation and Amounted to Practicing the Profession of Cosmetology as Defined by the Courts of California. She Was Denied Equal Protection of the Law in Violation of Due Process in Violation of the Fourteenth Amendment to the Constitution of the United States.

We respectfully urge that your petitioner was tried on a charge which, in effect, alleged she was giving such treatments that only a physician and surgeon could give—in effect, practicing medicine without a license. It is our contention that the facts most favorable to the State indicate clearly that the petitioner was practicing the art of cosmetology.

In the case of *People v. Penny*, 44 Cal. 2d 861, 285 P. 2d 926, at 929, the Supreme Court of the State of California defined cosmetology as follows: "The art of cosmetology includes the beautifying of the face, neck, arms, bust or upper part of the human body, by the use of cosmetic preparations, anticeptics, tonics, lotions or creams."

Obviously, that is just what your petitioner was doing: practicing cosmetology. She in no manner practiced medicine or anything related to it. These women went there to see her for rejuvenation of their faces, and your petitioner applied some liquid solution and some powder, as well as a mask made of tape. The evidence shows this

conclusively. She did no more, and this, we say, constituted the art of practicing cosmetology.

It is our contention that the law of California was not followed. She was discriminated against. She was denied the equal protection of the laws.

See, *Sheeley v. Kraemer*, 334 U. S. 1, 14.

California having taken a position by and through its Supreme Court in defining Cosmetology, the State was bound by that position and the decision of the lower Court was in violation thereof. See *People v. Penny, supra.* Recently this court held that a State having taken a position it was bound thereby: *NAACP v. Patterson*, 3 L. Ed. 2d 1205, 1207, U. S. Supreme Court Reports, where the Court said: "The State is bound by its previously taken position, namely, that decision of the sole question regarding the membership lists, is dispositive of the whole case."

The Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It seems clear that this Court will review a single violation of a constitutional right stemming from a judicial decision.

Hague v. C. I. O., 307 U. S. 496;

See also:

Hansberry v. Lee, 311 U. S. 32.

It is basic to our national concept of constitutional law that due process is fundamental to the true administration of justice.

Pennoyer v. Neff, 95 U. S. 714.

We contend there can be no doubt but that State action which violates or is "implicit in the concept of ordered liberty" (*Wolf v. Colorado*, 338 U. S. 25, 27) or which "shocks the conscience" (*Rochin v. California*, 342 U. S. 165, 172) is included within the scrutiny of the Due Process Clause.

It is clear that the California court permitted this woman, your petitioner, to be tried on a charge of practicing medicine without a license, when in truth and in fact she was practicing something that was clearly defined by the California Supreme Court as cosmetology. The law should be equally enforced as to all persons, and no one should be denied the right of practicing a profession or occupation in an unequal manner.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

RUSSELL E. PARSONS and
WILLIAM W. SHAW,
By RUSSELL E. PARSONS,
Attorneys for Petitioner.

APPENDIX.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Cora Galenti Giroux Smith, Defendant and Appellant. Superior Court No. CR A 4061.

Filed June 5, 1959.

On appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, California.

Harold C. Shepherd, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment and orders appealed from made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed.

MEMO.

The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt. (Peo. v. Garcia (1958), 166 A. C. A. 158-160.)

There was substantial evidence here that revealed that appellant's activities were in violation of Business & Professions Code 2141. The statute, which is claimed to be unconstitutional, contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted, in language giving fair notice of the practices to be avoided and this Court cannot say that the statute

is void for indefiniteness. (Sultan Turkish Bath v. Board of Police Commissioners (1959), 169 A. C. A. 194, 205-6; see Peo. v. Mangiagli (1950), CRA 257; People v. Hobson (1959), CR A 4018.)

Even if defendant were licensed as a cosmetologist, that license would not authorize her to do what she did here.

HULS,
Judge,

We concur:
SWAIN, *Acting Presiding Judge.*
DAVID, *Judge.*

IN THE

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CORA GALENTI GIROUX SMITH,

Petitioner,

vs.

STATE OF CALIFORNIA.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI.

I.

The Petition for Writ of Certiorari Should Be Denied.

Petitioner seeks a hearing in this Court upon the contention that her activities, as outlined in her petition, constituted the practice of cosmetology, not medicine. This theory is based on the case of *People v. Penny,* 44 Cal. 2d 861, which petitioner claims holds that acts of similar nature constitute the practice of cosmetology. Petitioner argues that her conviction of practicing medicine without a license (Business and Professions Code of California, Sec. 2141), is therefore a denial of equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The theory of petitioner is fatal from many standpoints.

Neither the construction nor the validity of Section 2141 of the Business and Professions Code was in issue in the *Penny* case, *supra*. Even if there were a degree of inconsistency between the holding in the *Penny* case and the Appellate Department's decision in the present case, which there is not, there would be no violation of equal protection of the law.

The Equal Protection Clause of the Fourteenth Amendment does not assure uniformity of judicial decisions.

Milwaukee Electric Railway & Light Co. v. Wisconsin, 252 U. S. 100;

Fidelity & Columbia Trust Company v. City of Louisville, 245 U. S. 54.

Furthermore, the construction of a state's statutes by its court of last resort must be accepted by the United States Supreme Court.

Williams v. Oklahoma, ... U. S. ....., 3 L. Ed. 2d 516;

Huddleston v. Dwyer, 332 U. S. 232.

Petitioner's conviction of having violated the State Medical Practice Act was affirmed by the Appellate Department of the Superior Court of the State of California, the highest state appellate court available to petitioner. (California Constitution, Art. 6, Sec. 5. See *Edwards v. California*, 314 U. S. 160.)

It is therefore submitted that the affirmance by the Appellate Department of the Superior Court conclusively establishes in the United States Supreme Court the conformity of such conviction to California law.

II.

Conclusion.

The petition for writ of certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or decided a federal question of substance not theretofore determined by this Court.

Respondent prays that the petition be denied.

Respectfully submitted,

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